

Doc Code: AP.PRE.REQ

PTO/SB/33 (07-05)

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PRE-APPEAL BRIEF REQUEST FOR REVIEW

Docket Number (Optional)

GUID. 014US01

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on August 27, 2007Signature Tracey M. DotterTyped or printed name Tracey M. Dotter

Application Number

101698,858

Filed

10/31/2003

First Named Inventor

Seim

Art Unit

3762

Examiner

Smith, T.

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

☐ applicant/inventor.☐ assignee of record of the entire interest.
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.
(Form PTO/SB/96)☒ attorney or agent of record.
Registration number 38,491☐ attorney or agent acting under 37 CFR 1.34.
Registration number if acting under 37 CFR 1.34 _____
SignatureMark A. Hollingsworth
Typed or printed name952-854-2700

Telephone number

August 27, 2007
Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below.

☒ *Total of 1 forms are submitted.

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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SERIAL NO. 10/698,858

PATENT APPLICATION

IN THE UNITED STATES PATENT & TRADEMARK OFFICE

Appellant:	Seim et al.	Examiner:	Smith, T.
Serial No.:	10/698,858	Group Art Unit:	3762
Filed:	October 31, 2003	Docket No.:	GUID.014US01
Title:	ATRIAL ANTITACHYCARDIA PACING MANAGEMENT		

CERTIFICATE UNDER 37 CFR 1.8: The undersigned hereby certifies that this Transmittal Letter and the papers, as described herein, are being deposited in the United States Postal Service, as first class mail, in an envelope addressed to: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on August 27, 2007.

By: 
Tracey M. Dotter

**APPELLANT'S STATEMENT IN SUPPORT OF
PRE-APPEAL BRIEF REQUEST FOR REVIEW**

Mail Stop AF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This statement is presented in compliance with the USPTO OG Notice of 12 July 2005 on New Pre-Appeal Brief Conference Pilot Program. Appellant requests a pre-appeal brief conference on the belief that the rejections of record are clearly not proper and without basis. Appellant's request is based upon a clear legal or factual deficiency in the rejections, rather than an interpretation of the claims or the prior art teachings. As such, Appellant believes this request for pre-appeal brief review is appropriate.

Claims 1-3, 10-19, 20, 24-27, 36-39, 44-55, and 59-62 are rejected based on 35 U.S.C. §102(e) as being anticipated by U.S. Patent No. 7,031,773 to *Levine et al.* (hereinafter "*Levine*").

While Appellant would present multiple issues on appeal, the purpose for submitting this request for review primarily concerns the §102(e) rejection of independent claims 1, 20, 36, 61, and 62, which is insufficiently supported by the teachings of *Levine*. Specifically, the Examiner appears to take the untenable position

that *Levine*'s switching from using one electrode set to another electrode set during capture-threshold testing constitutes disabling a therapy. The Examiner also appears to take the erroneous position that *Levine*'s auto-capture methodology constitutes an antitachycardia pacing (ATP) therapy.

Appellant's independent claims 1, 36, and 61 each recite some variation of disabling atrial antitachycardia pacing (ATP) therapy in response to a measured impedance deviating from a threshold.

Appellant's independent claims 20, 55, and 62 each recite some variation of disabling atrial ATP therapy delivery in response to any of the impedance, capture threshold, and sense amplitude measurements deviating from the impedance, capture threshold, and sense amplitude limits by predetermined impedance, capture threshold, and sense amplitude factors, respectively.

Levine discloses an auto-capture technique where, if an impedance measurement "falls outside of a predetermined or programmable impedance range," then the electrode configuration will be changed and capture will again be attempted. (Col. 11, Lines 10-31). Accordingly, *Levine* discloses continuing capture detection with a different electrode set while Appellant's independent claims recite disabling ATP therapy.

In response to Appellant's contentions, the Examiner stated on pages 2-3 of the Office Action mailed 5/25/2007 that:

In light of the broadest interpretation of the claimed limitation, it is the Examiner's position that *Levine* disables ATP as taught in column 11, lines 11-20 when therapy is switched from one electrode configuration (for illustration purposes I will call this configuration A) to a different electrode configuration (configuration B), therapy is disabled on configuration A. Applicant did not claim disabling atrial ATP therapy delivery and not applying therapy elsewhere after the therapy is disable. (Emphasis original).

Appellant respectfully submits that the Examiner misstates and improperly applies the tenants of claim interpretation, leading to an erroneous claim interpretation.

Specifically, the Examiner recites “the broadest interpretation of the claimed limitation,” even though claims must be given their broadest reasonable interpretation consistent with the specification. (MPEP § 2111; see *Phillips v. AWH Corp.*, 415 F.3d 1303, 75 USPQ2d 1321 (Fed. Cir. 2005)). Appellant respectfully submits that when the claims are properly interpreted, it is clear that they are not anticipated by *Levine*.

Appellant’s claims do not recite disabling only a particular set of electrodes, as it may appear from the Examiner’s interpretation of Appellant’s claims. Rather, the independent claims 1, 20, 36, 61, and 62 recite disabling ATP therapy. Because the therapy is disabled, it necessarily follows that the disabled therapy cannot be applied elsewhere (in its disabled state). If the therapy itself is disabled, then it is moot whether another electrode set would be able to deliver the therapy. Therefore, instead of teaching the disablement of a therapy, *Levine* teaches continuing the auto-capture testing, the testing just being performed using a different set of electrodes.

Accordingly, Appellant respectfully submits that *Levine* does not teach disabling ATP therapy, as claimed in independent claims 1, 20, 36, 61, and 62, and therefore fails to anticipate these claims.

Moreover, Appellant respectfully submits that *Levine* does not disclose disabling an ATP therapy in response to a measured parameter deviating from a threshold.

Levine discloses an auto-capture technique (Col. 10, Line 64-Col. 11, Line 4), and further discloses switching electrodes during auto-capture when a sensed impedance “falls outside of a predetermined or programmable impedance range” (Col. 11, Lines 10-31). Even so, *Levine*’s disclosure of switching electrodes for auto-capture does not constitute disabling ATP therapy.

For example, ATP is a therapy for treating tachycardia, tachycardia being characterized by an abnormally high heart rate. Auto-capture, on the other hand, is clearly not a therapy for treating tachycardia. Auto-capture, rather, is a procedure for determining pacing parameters for subsequent pacing therapy (i.e., the minimum energy required to effect capture of myocardial tissue). (See *Levine*, Col. 1, Lines 42-44 and Col. 1, Line 61 – Col. 2, Line 39). Appellant respectfully submits that one of ordinary skill in the art would readily understand that ATP therapy and auto-capture are distinct methodologies.

Although *Levine* lists anti-tachycardia pacing amongst other tiered therapies (Col. 8, Lines 51-52), *Levine's* mere mention of anti-tachycardia pacing is unconnected with *Levine's* discussion of switching electrodes during auto-capture, such that *Levine* does not contemplate disabling ATP therapy in response to a parameter exceeding a threshold.

For at least these reasons, Appellant respectfully submits that *Levine's* discussion of changing an electrode combination while performing an auto-capture procedure does not constitute a teaching of disabling ATP therapy.

Appellant's independent claims 1, 36, and 61 each recite some variation of disabling atrial antitachycardia pacing (ATP) therapy in response to a measured impedance deviating from a threshold, which is clearly not taught by *Levine*.

Appellant's independent claims 20, 55, and 62 each recite some variation of disabling atrial ATP therapy delivery in response to any of the impedance, capture threshold, and sense amplitude measurements deviating from the impedance, capture threshold, and sense amplitude limits by predetermined impedance, capture threshold, and sense amplitude factors, respectively, which also is clearly not taught by *Levine*.

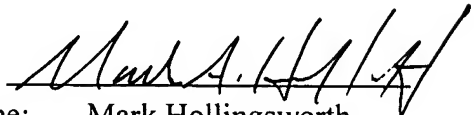
For each of the reasons discussed above, Appellant respectfully submits that claims 1, 20, 36, 61, and 62 recite features that must be given patentable weight and, when properly given such, clearly distinguish the elements and limitations of independent claims 1, 20, 36, 61, and 62 from *Levine's* disclosure. Consequently there is an omission of at least one essential element required for a proper anticipation rejection of independent claims 1, 20, 36, 61, and 62.

Claims 2-19, 21-35, and 37-60, which depend from independent claims 1, 20, and 36, are also not anticipated by *Levine*. Claims 2-19, 21-35, and 37-60 are patentable over *Levine* for at least the reason that these claims depend from one of patentable claims 1, 20, and 36 and that all elements of claims 2-19, 21-35, and 37-60 are not taught or suggested by *Levine*, for reasons discussed hereinabove and in Appellant's prior responses.

The undersigned is of record and with authority to prosecute the appeal on behalf of the Assignee.

Respectfully submitted,

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